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NOTICE OF INTENT

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October 23, 2012

VIA CERTIFIED MAIL  
RETURN RECEIPT REQUESTED

Andrew Galli, Operations Manager  
Mike Maldonado, Area Manager  
Louis B. Schipper, III, Director, CEMEX Environmental West  
CEMEX Construction Materials Pacific, LLC  
P.O. Box 537  
El Dorado, CA 95623

Andrew Galli, Operations Manager  
Mike Maldonado, Area Manager  
Louis B. Schipper, III, Director, CEMEX Environmental West  
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El Dorado, CA 95623

CEMEX Construction Materials Pacific, LLC  
c/o Corporate Creations Network, Inc., Agent for Service of Process  
131-A Stony Circle  
Santa Rosa, CA 95401

Re: Notice of Violations and Intent to File Suit Under the Federal Water  
Pollution Control Act

Dear Messrs. Galli, Maldonado and Schipper:

I am writing on behalf of the California Sportfishing Protection Alliance ("CSPA") in regard to violations of the Federal Water Pollution Control Act (commonly referred to as the "Clean Water Act") ("the Act") occurring at the ready mix concrete facility operated by CEMEX Construction Materials Pacific, LLC ("CEMEX") located at 5481 Davidson Road in El Dorado, California ("the Facility"). The WDD identification number for the Facility is S8091015607. CSPA is a non-profit public benefit corporation dedicated to the preservation, protection, and defense of the environment, wildlife and natural resources of French Creek, Big Canyon Creek, the Cosumnes River, the

DEPT OF JUSTICE - ENRD  
ENVIRONMENTAL DIVISION  
12 NOV - 7 AM 11:45

Mokelumne River, the San Joaquin River, the Sacramento-San Joaquin River Delta and other California waters. This letter is being sent to you as the responsible owner, officer, or operator of the Facility. Unless otherwise noted, CEMEX, Andrew Galli, Mike Maldonado and Louis B. Schipper, III, shall hereinafter be collectively referred to as CEMEX.

This letter addresses CEMEX's unlawful discharges of pollutants from the Facility to French Creek. French Creek then flows into Big Canyon Creek, which flows into the Cosumnes River, which flows into the Mokelumne River, which ultimately flows into the San Joaquin River and the Sacramento-San Joaquin River Delta. This letter addresses the ongoing violations of the substantive and procedural requirements of the Clean Water Act and National Pollutant Discharge Elimination System ("NPDES") General Permit No. CAS000001, State Water Resources Control Board Water Quality Order No. 91-13-DWQ, as amended by Order No. 97-03-DWQ ("General Permit" or "General Industrial Storm Water Permit").

Section 505(b) of the Clean Water Act provides that sixty (60) days prior to the initiation of a civil action under Section 505(a) of the Act (33 U.S.C. § 1365(a)), a citizen must give notice of intent to file suit. Notice must be given to the alleged violator, the U.S. Environmental Protection Agency ("the EPA"), and the State in which the violations occur.

As required by the Clean Water Act, this Notice of Violation and Intent to File Suit provides notice of the violations that have occurred, and continue to occur, at the Facility. Consequently, CEMEX, Andrew Galli, Mike Maldonado and Louis B. Schipper, III, are hereby placed on formal notice by CSPA that, after the expiration of sixty (60) days from the date of this Notice of Violation and Intent to File Suit, CSPA intends to file suit in federal court against CEMEX, Andrew Galli, Mike Maldonado and Louis B. Schipper, III under Section 505(a) of the Clean Water Act (33 U.S.C. § 1365(a)), for violations of the Clean Water Act and the General Permit. These violations are described more fully below.

#### I. Background.

CEMEX owns and operates a ready mix concrete manufacturing and distribution facility located in El Dorado, California. The Facility falls within Standard Industrial Classification ("SIC") Code 3273. The Facility is used to manufacture, store and transport ready mix concrete and/or the aggregate materials used in the process of manufacturing ready mix concrete. Other activities at the Facility include the use, maintenance and storage of heavy machinery and motorized vehicles, including trucks used to haul materials to, from and within the Facility.

On January 7, 2000, Sierra Ready Mix (i.e., the former operator of the Facility) submitted its notice of intent ("NOI") to operate the Facility in compliance with the terms of the General Industrial Storm Water Permit ("the General Permit"). Based on its

review of publicly available documents CSPA is informed and believes that CEMEX (i.e., the current operator of the Facility) has never filed a NOI indicating its intent to operate the Facility in compliance with the terms of the General Permit.

CEMEX collects and discharges storm water from its approximately 9-acre Facility through at least two (2) discharge points to French Creek. French Creek then flows into Big Canyon Creek, which flows into the Cosumnes River, which flows into the Mokelumne River, which ultimately flows into the San Joaquin River and the Sacramento-San Joaquin River Delta ("the Delta"). The Delta and its tributaries are waters of the United States within the meaning of the Clean Water Act.

The Central Valley Regional Water Quality Control Board (the "Regional Board" or "Board") has established water quality standards for the Sacramento River and the Delta in the "Water Quality Control Plan for the Sacramento River and San Joaquin River Basins," generally referred to as the Basin Plan. The Basin Plan includes a narrative toxicity standard which states that "[a]ll waters shall be maintained free of toxic substances in concentrations that produce detrimental physiological responses in human, plant, animal, or aquatic life." For the Delta, the Basin Plan establishes standards for several metals, including (at a hardness of 40 mg/L): arsenic - 0.01 mg/L; copper - 0.01; iron - 0.3 mg/L for iron; and zinc - 0.1 mg/L. *Id.* at III-3.00, Table III-1. The Basin Plan states that "[a]t a minimum, water designated for use as domestic or municipal supply (MUN) shall not contain lead in excess of 0.015 mg/L." *Id.* at III-3.00. The Basin Plan also provides that "[t]he pH shall not be depressed below 6.5 nor raised above 8.5." *Id.* at III-6.00. The Basin Plan also prohibits the discharges of oil and grease, stating that "[w]aters shall not contain oils, greases, waxes, or other materials in concentrations that cause nuisance, result in a visible film or coating on the surface of the water or on objects in the water, or otherwise adversely affect beneficial uses." *Id.* at III-5.00

The Basin Plan also provides that "[a]t a minimum, water designated for use as domestic or municipal supply (MUN) shall not contain concentrations of chemical constituents in excess of the maximum contaminant levels (MCLs)." *Id.* at III-3.0. The EPA has issued a recommended water quality criteria for aluminum for freshwater aquatic life protection of 0.087 mg/L. EPA has established a secondary MCL, consumer acceptance limit for aluminum of 0.05 mg/L to 0.2 mg/L. EPA has established a secondary MCL, consumer acceptance limit for zinc of 5 mg/L. EPA has established a primary MCL, consumer acceptance limit for the following: chromium - 0.1 mg/L; copper - 1.3 mg/L; and lead - 0.0 (zero) mg/L. See <http://www.epa.gov/safewater/mcl.html>. The California Department of Health Services has also established the following MCL, consumer acceptance levels: aluminum - 1 mg/L (primary) and 2 mg/L (secondary); chromium - 0.5 mg/L (primary); copper - 1.0 (secondary); iron - 0.3 mg/L; and zinc - 5 mg/L. See California Code of Regulations, title 22, §§ 64431, 64449.

EPA has also issued numeric receiving water limits for certain toxic pollutants in California surface waters, commonly known as the California Toxics Rule ("CTR"), 40 C.F.R. § 131.38. The CTR establishes the following numeric limits for freshwater



surface waters: arsenic – 0.34 mg/L (maximum concentration) and 0.150 mg/L (continuous concentration); chromium (III) – 0.550 mg/L (maximum concentration) and 0.180 mg/L (continuous concentration); copper – 0.013 mg/L (maximum concentration) and 0.009 mg/L (continuous concentration); lead – 0.065 mg/L (maximum concentration) and 0.0025 mg/L (continuous concentration).

The Regional Board has also identified waters of the Delta as failing to meet water quality standards for unknown toxicity, electrical conductivity, numerous pesticides, and mercury. See <http://www.swrcb.ca.gov/tmdl/docs/2002reg303dlist.pdf>. Discharges of listed pollutants into an impaired surface water may be deemed a "contribution" to the exceedance of CTR, a water quality standard, and may indicate a failure on the part of a discharger to implement adequate storm water pollution control measures. See *Waterkeepers Northern Cal. v. Ag Indus. Mfg. Inc.*, 375 F.3d 913, 918 (9th Cir. 2004); see also *Waterkeepers Northern Cal. v. Ag Indus. Mfg. Inc.*, 2005 WL 2001037 at \*3, 5 (E.D. Cal., Aug. 19, 2005) (finding that a discharger covered by the General Industrial Storm Water Permit was "subject to effluent limitation as to certain pollutants, including zinc, lead, copper, aluminum and lead" under the CTR).

The General Permit incorporates benchmark levels established by EPA as guidelines for determining whether a facility discharging industrial storm water has implemented the requisite best available technology economically achievable ("BAT") and best conventional pollutant control technology ("BCT"). The following benchmarks have been established for pollutants discharged by CEMEX: total suspended solids – 100 mg/L; oil & grease – 15.0 mg/L; and, iron – 1.0 mg/L. The State Water Quality Control Board has also proposed adding a benchmark level for specific conductance of 200  $\mu$ mhos/cm.

## II. CEMEX is Violating the Act by Discharging Pollutants From the Facility to Waters of the United States Without a NPDES Permit

Under the Act, it is unlawful to discharge pollutants from a "point source" to navigable waters without obtaining and complying with a permit governing the quantity and quality of discharges. *Trustees for Alaska v. EPA*, 749 F.2d 549, 553 (9th Cir. 1984). Section 301(a) of the Clean Water Act prohibits "the discharge of any pollutants by any person . . ." except as in compliance with, among other sections of the Act, Section 402, the NPDES permitting requirements. 33 U.S.C. § 1311(a). The duty to apply for a permit extends to "[a]ny person who discharges or proposes to discharge pollutants . . ." 40 C.F.R. § 122.21(a).

The term "discharge of pollutants" means "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). Pollutants are defined to include, among other examples, a variety of metals, chemical wastes, biological materials, heat, rock, and sand discharged into water. 33 U.S.C. § 1362(6). A point source is defined as "any discernable, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, [or] conduit . . . from which pollutants are

or may be discharged." 33 U.S.C. § 1362(14). An industrial facility that discharges pollutants into a navigable water is subject to regulation as a "point source" under the Clean Water Act. *Comm. to Save Mokelumne River v. East Bay Mun. Util. Dist.*, 13 F.3d 305, 308 (9th Cir. 1993). "Navigable waters" means "the waters of the United States." 33 U.S.C. § 1362(7). Navigable waters under the Act include man-made waterbodies and any tributaries or waters adjacent to other waters of the United States. See *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 533 (9th Cir. 2001).

French Creek, Big Canyon Creek, the Cosumnes River, and the Mokelumne River are waters of the United States, which flow into the San Joaquin River and ultimately to the Sacramento-San Joaquin Delta. Accordingly, the Facility's discharges of storm water containing pollutants to French Creek are discharges to waters of the United States. CSPA anticipates CEMEX will assert it is lawfully operating the Facility under the General Permit because the former operator of the Facility, Sierra Ready Mix, filed a NOI to operate the Facility in compliance with the terms of the General Permit on January 7, 2000. However, the plain language of the General Permit compels the opposite conclusion. Attachment 3 to the General Permit (NOTICE OF INTENT (NOI) INSTRUCTIONS) states, in relevant part:

### Change of Information

If the information provided on the NOI or site map changes, you should report the changes to the State Water Board using an NOI form. Section I of the line-by-line instructions includes information regarding changes to the NOI.

### NOI LINE-BY-LINE INSTRUCTIONS

#### **Section I – NOI STATUS**

Check box "B" if you are reporting changes to the NOI (e.g., new contact person, phone number, mailing address). Include the facility WQID #. Highlight all the information that has been changed.

Please note that a change of information does not apply to a change of facility operator or a change in the location of the facility. These changes require a Notice of Termination (NOT) and submittal of a new NOI and annual fee.

#### **Section II – Facility Operator Information**

Part A: The facility operator is the legal entity that is responsible for all permit related compliance activities at the facility. In most cases, the facility operator is the owner of the business or operation where the industrial activity occurs. Give the legal name and the

address of the person, firm, public organization, or any other entity that is responsible for complying with the General Permit.  
(Emphasis in original).

Based on the above-cited portion of the General Permit and its review of publicly available documents, CSPA is informed and believes that: (1) Sierra Ready Mix filed the only NOI ever filed for the Facility in 2000; (2) Sierra Ready Mix has never filed a Notice of Termination (NOT) for the Facility; (3) CEMEX has never filed a NOI for the Facility since it began operating the Facility; and, (4) CEMEX has operated the Facility unlawfully without a permit every day for the last five years.

For at least the last five years, CEMEX has discharged pollutants from the Facility into French Creek and, ultimately, the San Joaquin River and Delta without a NPDES permit. CSPA is informed and believes, and thereupon alleges, that CEMEX has discharged and is discharging pollutants from the Facility to waters of the United States every day that there has been or will be any measurable flow of water from the Facility for the last five years. Each discharge on each separate day is a separate violation of Section 301(a) of the Act, 33 U.S.C. § 1311(a). These unlawful discharges are ongoing. Consistent with the five-year statute of limitations applicable to citizen enforcement actions brought pursuant to the federal Clean Water Act, CEMEX is subject to penalties for violations of the Act since October 23, 2007.

### III. CEMEX is Violating the Act by Discharging Pollutants From the Facility to Waters of the United States

Under the Act, it is unlawful to discharge pollutants from a "point source" to navigable waters without obtaining and complying with a permit governing the quantity and quality of discharges. *Trustees for Alaska v. EPA*, 749 F.2d 549, 553 (9th Cir. 1984). Section 301(a) of the Clean Water Act prohibits "the discharge of any pollutants by any person . . ." except as in compliance with, among other sections of the Act, Section 402, the NPDES permitting requirements. 33 U.S.C. § 1311(a). The duty to apply for a permit extends to "[a]ny person who discharges or proposes to discharge pollutants. . . ." 40 C.F.R. § 122.21(a).

The term "discharge of pollutants" means "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). Pollutants are defined to include, among other examples, a variety of metals, chemical wastes, biological materials, heat, rock, and sand discharged into water. 33 U.S.C. § 1362(6). A point source is defined as "any discernable, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, [or] conduit . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). An industrial facility that discharges pollutants into a navigable water is subject to regulation as a "point source" under the Clean Water Act. *Comm. to Save Mokelumne River v. East Bay Mun. Util. Dist.*, 13 F.3d 305, 308 (9th Cir. 1993). "Navigable waters" means "the waters of the United States." 33 U.S.C. § 1362(7). Navigable waters under the Act include man-made waterbodies and

any tributaries or waters adjacent to other waters of the United States. *See Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 533 (9th Cir. 2001).

The Delta and its tributaries are waters of the United States. Accordingly, CEMEX's discharges of storm water containing pollutants from the Facility are discharges to waters of the United States.

CSPA is informed and believes, and thereupon alleges, that CEMEX has discharged and is discharging pollutants from the Facility to waters of the United States every day that there has been or will be any measurable flow of water from the Facility for the last five years. Each discharge on each separate day is a separate violation of Section 301(a) of the Act, 33 U.S.C. § 1311(a). These unlawful discharges are ongoing. Consistent with the five-year statute of limitations applicable to citizen enforcement actions brought pursuant to the federal Clean Water Act, CEMEX is subject to penalties for violations of the Act since October 23, 2007.

### IV. Pollutant Discharges in Violation of the NPDES Permit.

CEMEX has violated and continues to violate the terms and conditions of the General Permit. Section 402(p) of the Act prohibits the discharge of storm water associated with industrial activities, except as permitted under an NPDES permit such as the General Permit. 33 U.S.C. § 1342. The General Permit prohibits any discharges of storm water associated with industrial activities that have not been subjected to BAT or BCT. Effluent Limitation B(3) of the General Permit requires dischargers to reduce or prevent pollutants in their storm water discharges through implementation of BAT for toxic and nonconventional pollutants and BCT for conventional pollutants. BAT and BCT include both nonstructural and structural measures. General Permit, Section A(6). Conventional pollutants are TSS, O&G, pH, biochemical oxygen demand ("BOD"), and fecal coliform. 40 C.F.R. § 401.16. All other pollutants are either toxic or nonconventional. *Id.*; 40 C.F.R. § 401.15.

Further, Discharge Prohibition A(1) of the General Permit provides: "Except as allowed in Special Conditions (D.1.) of this General Permit, materials other than storm water (non-storm water discharges) that discharge either directly or indirectly to waters of the United States are prohibited. Prohibited non-storm water discharges must be either eliminated or permitted by a separate NPDES permit." Special Conditions D(1) of the General Permit sets forth the conditions that must be met for any discharge of non-storm water to constitute an authorized non-storm water discharge.

Receiving Water Limitation C(1) of the General Permit prohibits storm water discharges and authorized non-storm water discharges to surface or groundwater that adversely impact human health or the environment. Receiving Water Limitation C(2) of the General Permit also prohibits storm water discharges and authorized non-storm water discharges that cause or contribute to an exceedance of any applicable water quality



standards contained in a Statewide Water Quality Control Plan or the applicable Regional Board's Basin Plan.

As recently as October 23, 2009, the Regional Water Quality Control Board, Region 3, sent CEMEX a letter ("the October 2009 letter") conveying its conclusion that, among other things, CEMEX's 2008-2009 Annual Report contained evidence that the BMPs then in effect were not sufficient to reduce pollutant concentrations below EPA benchmark levels. The October 2009 letter informed CEMEX that its 2008-2009 Annual Report indicated storm water samples in excess of US EPA benchmark values for certain parameters. Based on this evidence, the Board ordered CEMEX to: (1) Review previously submitted Annual Reports and identify the number of consecutive years that the Facility has exceeded benchmark levels; (2) Identify sources of pollutants at the Facility that contributed to the exceedances; (3) Review current BMPs; (4) Modify existing BMPs or implement additional BMPs to reduce or eliminate discharge of pollutants; and (5) modify the SWPPP and Monitoring Plan for the Facility and maintain a copy of these required documents at the Facility. Finally, the Board ordered CEMEX to respond to these concerns by providing the Board a written response by no later than December 1, 2009.

Based on its review of available public documents, CSPA is informed and believes: (1) that CEMEX failed to provide the Board the ordered written response by December 1, 2009; (2) that CEMEX continues to discharge these very same pollutants in excess of benchmarks; and, (3) that CEMEX has failed to implement BMPs adequate to bring its discharge of these and other pollutants in compliance with the General Permit. CEMEX's ongoing violations are discussed further below.

**A. CEMEX Has Discharged Storm Water Containing Pollutants in Violation of the Permit.**

CEMEX has discharged and continues to discharge stormwater with unacceptable levels of pH, Total Suspended Solids (TSS), Electrical/Specific Conductance (SC) and Iron (Fe) in violation of the General Permit. These high pollutant levels have been documented during significant rain events, including the rain events indicated in the table of rain data attached hereto as Attachment A. CEMEX's Annual Reports and Sampling and Analysis Results confirm discharges of materials other than storm water and specific pollutants in violation of the Permit provisions listed above. Self-monitoring reports under the Permit are deemed "conclusive evidence of an exceedance of a permit limitation." *Sierra Club v. Union Oil*, 813 F.2d 1480, 1493 (9th Cir. 1988).

The following discharges of pollutants from the Facility have violated Discharge Prohibitions A(1) and A(2) and Receiving Water Limitations C(1) and C(2) of the General Industrial Storm Water Permit:

**1. Discharges of Storm Water Containing Total Suspended Solids (TSS) at Concentrations in Excess of Applicable EPA Benchmark Value**

Date	Sampling Location	Parameter	Concentration in Discharge	EPA Benchmark Value
02/29/2012	SW-2	TSS	410 mg/L	100 mg/L
10/25/2010	SW-2	TSS	360 mg/L	100 mg/L

**2. Discharges of Storm Water Containing pH in Excess of Applicable EPA Benchmark Value**

Date	Sampling Location	Parameter	Concentration in Discharge	EPA Benchmark Value
01/23/2009	Storm Water Pond Outlet	pH	9.16 s.u.	6.0 - 9.0 s.u.

**3. Discharges of Storm Water Containing Specific Conductance (SC) at Concentrations in Excess of State Board-Proposed EPA Benchmark Value**

Date	Sampling Location	Parameter	Concentration in Discharge	Proposed Benchmark Value
03/14/2012	SW-2	SC	250 µmhos/cm	200 µmhos/cm
02/29/2012	SW-1	SC	390 µmhos/cm	200 µmhos/cm
02/29/2012	SW-2	SC	250 µmhos/cm	200 µmhos/cm
02/17/2011	SW-2	SC	260 µmhos/cm	200 µmhos/cm
03/02/2009	Storm Water Pond Outlet	SC	220 µmhos/cm	200 µmhos/cm
01/23/2009	Storm Water Pond Outlet	SC	360 µmhos/cm	200 µmhos/cm
01/10/2008	Outfall 1	SC	300 µmhos/cm	200 µmhos/cm

4. Discharges of Storm Water Containing Iron (Fe) at Concentrations in Excess of Applicable EPA Benchmark Value

Date	Sampling Location	Parameter	Concentration In Discharge	EPA Benchmark Value
03/14/2012	SW-2	Fe	4.9 mg/L	1.0 mg/L
02/29/2012	SW-1	Fe	11 mg/L	1.0 mg/L
02/29/2012	SW-2	Fe	23 mg/L	1.0 mg/L
02/17/2011	SW-2	Fe	1.3 mg/L	1.0 mg/L
10/25/2010	SW-1	Fe	1.9 mg/L	1.0 mg/L
10/25/2010	SW-2	Fe	1.2 mg/L	1.0 mg/L
03/02/2009	Storm Water	Fe	1.3 mg/L	1.0 mg/L
	Storm Water	Fe		
01/23/2009	Pond Outlet	Fe	1.2 mg/L	1.0 mg/L

CSPA's investigation, including its review of CEMEX's analytical results documenting pollutant levels in the Facility's storm water discharges well in excess of EPA's benchmark values and the State Board's proposed benchmark for specific conductivity, indicates that CEMEX has not implemented BAT and BCT at the Facility for its discharges of pH, Total Suspended Solids (TSS), Iron (Fe), Specific Conductance (SC) and other pollutants, in violation of Effluent Limitation R(3) of the General Permit. CEMEX was required to have implemented BAT and BCT by no later than October 1, 1992 of the start of its operations. Thus, CEMEX is discharging polluted storm water associated with its industrial operations without having implemented BAT and BCT.

CSPA is informed and believes that CEMEX has known that its storm water contains pollutants at levels exceeding EPA Benchmarks and other water quality criteria since at least October 23, 2007. CSPA alleges that such violations also have occurred and will occur on other rain dates, including during every single significant rain event that has occurred since October 23, 2007, and that will occur at the Facility subsequent to the date of this Notice of Violation and Intent to File Suit. Attachment A, attached hereto, sets forth each of the specific rain dates on which CSPA alleges that CEMEX has discharged storm water containing impermissible levels of pH, Total Suspended Solids (TSS), Iron (Fe), Specific Conductance (SC) and other unmonitored pollutants (e.g., Chemical Oxygen Demand) in violation of Discharge Prohibitions A(1) and A(2) and Receiving Water Limitations C(1) and C(2) of the General Permit.

These unlawful discharges from the Facility are ongoing. Each discharge of stormwater containing any pollutants from the Facility without the implementation of BAT/BCT constitutes a separate violation of the General Permit and the Act. Consistent with the five-year statute of limitations applicable to citizen enforcement actions brought pursuant to the federal Clean Water Act, CEMEX is subject to penalties for violations of the General Permit and the Act since October 23, 2007.

B. CEMEX Has Failed to Implement an Adequate Monitoring & Reporting Plan.

Section B of the General Industrial Storm Water Permit requires that dischargers develop and implement an adequate Monitoring and Reporting Plan by no later than October 1, 1992 or the start of operations. Sections B(3), B(4) and B(7) require that dischargers conduct regularly scheduled visual observations of non-storm water and storm water discharges from the Facility and to record and report such observations to the Regional Board. Section B(5)(a) of the General Permit requires that dischargers "shall collect storm water samples during the first hour of discharge from (1) the first storm event of the wet season, and (2) at least one other storm event in the wet season. All storm water discharge locations shall be sampled." Section B(5)(c)(i) further requires that the samples shall be analyzed for total suspended solids, pH, specific conductance, and total organic carbon. Oil and grease may be substituted for total organic carbon. Section B(5)(ii) of the General Permit further requires dischargers to analyze samples for all "[t]oxic chemicals and other pollutants that are likely to be present in storm water discharges in significant quantities."

Based on its investigation, CSPA is informed and believes that CEMEX has failed to develop and implement an adequate Monitoring & Reporting Plan. First, based on its review of publicly available documents, CSPA is informed and believes that CEMEX has failed to collect storm water samples during at least two qualifying storm events (as defined by the General Permit) during each of the past five years. Second, based on its review of publicly available documents, CSPA is informed and believes that storm water discharges from the Facility at points other than the three sampling/discharge points currently designated by CEMEX. Each of these failures constitutes a separate and ongoing violation of the General Permit and the Act. Consistent with the five-year statute of limitations applicable to citizen enforcement actions brought pursuant to the federal Clean Water Act, CEMEX is subject to penalties for violations of the General Permit and the Act since October 23, 2007. These violations are set forth in greater detail below:

1. CEMEX Has Failed to Collect Storm Water Samples from Each Discharge Point During at least Two Rain Events In Each of the Last Five Years.

Based on its review of publicly available documents, CSPA is informed and believes that CEMEX has failed to collect storm water samples from all discharge points during at least two qualifying rain events at the Facility during each of the past five years. For example, CSPA notes that while the Annual Report filed by CEMEX for the Facility for the 2011-2012 Wet Season reported that CEMEX analyzed samples of storm water discharged during two qualifying storm events this past Wet Season, upon closer scrutiny it appears that the storm sampled on March 14, 2012 was not a qualifying storm event within the meaning of the General Permit (discussed further below). Moreover, based on



its investigation, CSPA is informed and believes that storm water discharges from the Facility at points other than the two sampling/discharge points currently designated by CEMEX. This failure to adequately monitor storm water discharges constitutes separate and ongoing violations of the General Permit and the Act.

**2. CEMEX Has Failed to Collect Samples of Storm Water from Each Facility Storm Water Discharge Location During at least Two Rain Events in Each of the Last Five Years as Required by the General Permit.**

The General Permit mandates that "Facility operators shall visually observe and collect samples of storm water discharges from all drainage areas that represent the quality and quantity of the facility's storm water discharges from the storm event." General Permit, Section B.7.a. Based on its investigation and review of publicly available documents, CSPA is informed and believes that storm water discharges from the Facility at points other than the two sampling/discharge points currently designated by CEMEX. This failure to adequately monitor storm water discharges constitutes separate and ongoing violations of the General Permit and the Act.

**3. CEMEX Is Subject to Penalties for Its Failure to Implement an Adequate Monitoring & Reporting Plan Since October 23, 2007.**

CSPA is informed and believes that available documents demonstrate CEMEX's consistent and ongoing failure to implement an adequate Monitoring Reporting Plan in violation of Section B of the General Permit. For example, CSPA notes that while the Annual Report filed by CEMEX for the Facility for the 2011-2012 Wet Season reported that CEMEX analyzed samples of storm water discharged during two qualifying storm events this past Wet Season, upon closer scrutiny it appears that the storm sampled on March 14, 2012 was not a qualifying storm event within the meaning of the General Permit. The storm that occurred at the Facility on March 14, 2012 was not a qualifying storm event within the meaning of the General Permit because publicly available precipitation records demonstrate that enough rain fell on the Facility the preceding working day at a level sufficient to cause storm water to discharge from the Facility. Recall that under the General Permit, a qualifying storm event is one that causes storm water to discharge from a facility during scheduled operating hours and that occurs on a date preceded by at least three days without storm water having discharged from the site. General Permit, Section B.5.b. Given that it rained enough to produce a storm water discharge at the Facility the work day directly prior to March 14, 2012, the storm that occurred on March 14<sup>th</sup> was not a qualifying storm event. Accordingly, consistent with the five-year statute of limitations applicable to citizen enforcement actions brought pursuant to the federal Clean Water Act, CEMEX is subject to penalties for these violations of the General Permit and the Act since October 23, 2007.

**C. CEMEX Has Failed to Implement BAT and BCT.**

Effluent Limitation B(3) of the General Permit requires dischargers to reduce or prevent pollutants in their storm water discharges through implementation of BAT for toxic and nonconventional pollutants and BCT for conventional pollutants. BAT and BCT include both nonstructural and structural measures. General Permit, Section A(8). CSPA's investigation indicates that CEMEX has not implemented BAT and BCT at the Facility for its discharges of pH, Total Suspended Solids (TSS), Specific Conductance (SC), Iron (Fe) and other unmonitored pollutants in violation of Effluent Limitation B(3) of the General Permit.

To meet the BAT/BCT requirement of the General Permit, CEMEX must evaluate all pollutant sources at the Facility and implement the best structural and non-structural management practices economically achievable to reduce or prevent the discharge of pollutants from the Facility. Based on the limited information available regarding the internal structure of the Facility, CSPA believes that at a minimum CEMEX must improve its housekeeping practices, store materials that act as pollutant sources under cover or in contained areas, treat storm water to reduce pollutants before discharge (e.g., with filters or treatment boxes), and/or prevent storm water discharge altogether. CEMEX has failed to adequately implement such measures.

CEMEX was required to have implemented BAT and BCT by no later than October 1, 1992. Therefore, CEMEX has been in continuous violation of the BAT and BCT requirements every day since October 1, 1992, and will continue to be in violation every day that it fails to implement BAT and BCT. CEMEX is subject to penalties for violations of the General Permit and the Act occurring since October 23, 2007.

**D. CEMEX Has Failed to Develop and Implement an Adequate Storm Water Pollution Prevention Plan.**

Section A(1) and Provision E(2) of the General Permit require dischargers of storm water associated with industrial activity to develop, implement, and update an adequate storm water pollution prevention plan ("SWPPP") no later than October 1, 1992. Section A(1) and Provision E(2) requires dischargers who submitted an NOI pursuant to Water Quality Order No. 97-03-DWQ to continue following their existing SWPPP and implement any necessary revisions to their SWPPP in a timely manner, but in any case, no later than August 1, 1997.

The SWPPP must, among other requirements, identify and evaluate sources of pollutants associated with industrial activities that may affect the quality of storm and non-storm water discharges from the facility and identify and implement site-specific best management practices ("BMPs") to reduce or prevent pollutants associated with industrial activities in storm water and authorized non-storm water discharges (General Permit, Section A(2)). The SWPPP must also include BMPs that achieve BAT and BCT (Effluent Limitation B(3)). The SWPPP must include: a description of individuals and



their responsibilities for developing and implementing the SWPPP (General Permit, Section A(3)); a site map showing the facility boundaries, storm water drainage areas with flow pattern and nearby water bodies, the location of the storm water collection, conveyance and discharge system, structural control measures, impervious areas, areas of actual and potential pollutant contact, and areas of industrial activity (General Permit, Section A(4)); a list of significant materials handled and stored at the site (General Permit, Section A(5)); a description of potential pollutant sources including industrial processes, material handling and storage areas, dust and particulate generating activities, a description of significant spills and leaks, a list of all non-storm water discharges and their sources, and a description of locations where soil erosion may occur (General Permit, Section A(6)).

The SWPPP also must include an assessment of potential pollutant sources at the Facility and a description of the BMPs to be implemented at the Facility that will reduce or prevent pollutants in storm water discharges and authorized non-storm water discharges, including structural BMPs where non-structural BMPs are not effective (General Permit, Section A(7), (8)). The SWPPP must be evaluated to ensure effectiveness and must be revised where necessary (General Permit, Section A(9)(10)). Receiving Water Limitation C(3) of the Order requires that dischargers submit a report to the appropriate Regional Water Board that describes the BMPs that are currently being implemented and additional BMPs that will be implemented to prevent or reduce the discharge of any pollutants causing or contributing to the exceedance of water quality standards.

CSPA's investigation and review of available documents regarding conditions at the Facility indicate that CEMEX has been operating with an inadequately developed or implemented SWPPP in violation of the requirements set forth above. CEMEX has failed to evaluate the effectiveness of its BMPs and to revise its SWPPP as necessary. Accordingly, CEMEX has been in continuous violation of Section A(1) and Provision E(2) of the General Permit every day since October 1, 1992, and will continue to be in violation every day that it fails to develop and implement an effective SWPPP. CEMEX is subject to penalties for violations of the Order and the Act occurring since October 23, 2007.

**E. CEMEX Has Failed to Address Discharges Contributing to Exceedances of Water Quality Standards.**

Receiving Water Limitation C(3) requires a discharger to prepare and submit a report to the Regional Board describing changes it will make to its current BMPs in order to prevent or reduce the discharge of any pollutant in its storm water discharges that is causing or contributing to an exceedance of water quality standards. Once approved by the Regional Board, the additional BMPs must be incorporated into the Facility's SWPPP. The report must be submitted to the Regional Board no later than 60-days from the date the discharger first learns that its discharge is causing or contributing to an exceedance of an applicable water quality standard. Receiving Water Limitation C(4)(a).

Section C(1)(d) of the Permit's Standard Provisions also requires dischargers to report any noncompliance. *See also* Provision E(6). Lastly, Section A(9) of the Permit requires an annual evaluation of storm water controls including the preparation of an evaluation report and implementation of any additional measures in the SWPPP to respond to the monitoring results and other inspection activities.

As indicated above, CEMEX is discharging elevated levels of pH, Total Suspended Solids (TSS), Specific Conductance (SC), Iron (Fe) and other unmonitored pollutants that are causing or contributing to exceedances of applicable water quality standards. For each of these pollutant exceedances, CEMEX was required to submit a report pursuant to Receiving Water Limitation C(4)(a) within 60-days of becoming aware of levels in its storm water exceeding the EPA Benchmarks and applicable water quality standards.

Based on CSPA's review of available documents, CEMEX was aware of high levels of these pollutants prior to October 23, 2007. Likewise, CEMEX has generally failed to file reports describing its noncompliance with the General Permit in violation of Section C(1)(d). CEMEX has been in continuous violation of Receiving Water Limitation C(4)(a) and Sections C(1)(d) and A(9) of the General Permit every day since October 23, 2007, and will continue to be in violation every day it fails to prepare and submit the requisite reports, receives approval from the Regional Board and amends its SWPPP to include approved BMPs. CEMEX is subject to penalties for violations of the General Permit and the Act occurring since October 23, 2007.

**F. CEMEX Has Has Discharged Unauthorized Non-Storm Water in Violation of the General Permit.**

Based on its investigation, CSPA is informed and believes that CEMEX has discharged and continues to discharge unauthorized non-storm water from the Facility. CSPA notes that previously filed Annual Reports and/or Facility maps indicate that process water (i.e., unauthorized non-storm water) commingles with storm water and then discharges from the Facility. Accordingly, CSPA is informed and believes that CEMEX is discharging unauthorized non-storm water from the Facility. CEMEX has been in continuous violation of Discharge Prohibition A(1) of the General Permit every day since October 23, 2007, and will continue to be in violation every day CEMEX fails to eliminate its discharges of unauthorized non-storm water or obtains a separate NPDES permit to authorize such discharges of non-storm water. Accordingly, CEMEX is subject to penalties for violations of the General Permit and the Act occurring since October 23, 2007.

**IV. Persons Responsible for the Violations.**

CSPA puns CEMEX Construction Materials Pacific, LLC, Andrew Galli, Mike Maldonado and Louis B. Schipper, III on notice that they are the persons responsible for the violations described above. If additional persons are subsequently identified as also



Notice of Violation and Intent To File Suit  
October 23, 2012  
Page 16 of 17

being responsible for the violations set forth above, CSPA puns CEMEX Construction Materials Pacific, LLC, Andrew Galli, Mike Maldonado and Louis B. Schipper, III on notice that it intends to include those persons in this action.

V. Name and Address of Noticing Party.

Our name, address and telephone number is as follows: California Sportfishing Protection Alliance, Bill Jennings, Executive Director, 3536 Rainier Avenue, Stockton, CA 95204; Phone: (209) 464-5067.

VI. Counsel.

CSPA has retained legal counsel to represent it in this matter. Please direct all communications to:

Andrew L. Packard  
Erik M. Roper  
Law Offices of Andrew L. Packard  
100 Peninsula Boulevard, Suite 301  
Peninsula, CA 94952  
Tel. (707) 763-7227  
Fax. (707) 763-9227  
Email: Andrew@Packardlawoffices.com  
Erik@Packardlawoffices.com

VII. Penalties.

Pursuant to Section 309(d) of the Act (33 U.S.C. § 1319(d)) and the Adjustment of Civil Monetary Penalties for Inflation (40 C.F.R. § 19.4) each separate violation of the Act subjects CEMEX Construction Materials Pacific, LLC, Andrew Galli, Mike Maldonado and Louis B. Schipper, III to a penalty of up to \$32,500 per day per violation for all violations occurring after March 15, 2004, and \$37,500 per day per violation for all violations occurring after January 12, 2009, during the period commencing five years prior to the date of this Notice of Violations and Intent to File Suit. In addition to civil penalties, CSPA will seek injunctive relief preventing further violations of the Act pursuant to Sections 505(a) and (d) (33 U.S.C. § 1365(a) and (d)) and such other relief as permitted by law. Lastly, Section 505(d) of the Act (33 U.S.C. § 1365(d)), permits prevailing parties to recover costs and fees, including attorneys' fees.

CSPA believes this Notice of Violations and Intent to File Suit sufficiently states grounds for filing suit. We intend to file a citizen suit under Section 505(a) of the Act against CEMEX Construction Materials Pacific, LLC and its agents for the above-referenced violations upon the expiration of the 60-day notice period. If you wish to pursue remedies in the absence of litigation, we suggest that you initiate those discussions within the next 20 days so that they may be completed before the end of the 60-day

Notice of Violation and Intent To File Suit  
October 23, 2012  
Page 17 of 17

notice period. We do not intend to delay the filing of a complaint in federal court if discussions are continuing when that period ends.

Sincerely,



Bill Jennings, Executive Director  
California Sportfishing Protection Alliance

**ATTACHMENT A**  
**Notice of Intent to File Suit, CEMEX (El Dorado, CA)**  
**Significant Rain Events,\* October 23, 2007 – October 23, 2012**

**SERVICE LIST**

Lisa Jackson, Administrator  
 U.S. Environmental Protection Agency  
 1200 Pennsylvania Avenue, N.W.  
 Washington, D.C. 20460

Jared Blumenfeld  
 Administrator, U.S. EPA – Region 9  
 75 Hawthorne Street  
 San Francisco, CA, 94105

Eric Holder  
 U.S. Attorney General  
 U.S. Department of Justice  
 950 Pennsylvania Avenue, N.W.  
 Washington, DC 20530-0001

Dorothy R. Rice, Executive Director  
 State Water Resources Control Board  
 1001 I Street Sacramento, CA 95814  
 P.O. Box 100  
 Sacramento, CA 95812-0100

Pamela Crendon, Executive Officer  
 Regional Water Quality Control Board  
 Central Valley Region  
 11020 Sun Center Drive #200  
 Rancho Cordova, CA 95670-6114

Oct.	22	2007	Feb.	09	2009	Mar.	25	2010	Feb.	29	2012
Oct.	20	2007	Feb.	11	2009	Mar.	26	2010	Mar.	01	2012
Nov.	13	2007	Feb.	12	2009	Mar.	30	2010	Mar.	02	2012
Dec.	07	2007	Feb.	13	2009	Mar.	31	2010	Mar.	03	2012
Dec.	10	2007	Feb.	17	2009	Apr.	05	2010	Mar.	13	2012
Dec.	17	2007	Feb.	18	2009	Apr.	12	2010	Mar.	14	2012
Dec.	18	2007	Mar.	02	2009	Apr.	13	2010	Mar.	15	2012
Dec.	19	2007	Mar.	03	2009	Apr.	20	2010	Mar.	16	2012
Dec.	20	2007	Mar.	04	2009	Apr.	21	2010	Apr.	05	2012
Dec.	27	2007	Mar.	16	2009	Apr.	22	2010	Apr.	11	2012
Dec.	31	2007	Mar.	23	2009	Apr.	28	2010	Apr.	12	2012
Jan.	04	2008	Apr.	08	2009	Apr.	29	2010	Apr.	13	2012
Jan.	07	2008	Apr.	09	2009	May	11	2010	Apr.	14	2012
Jan.	09	2008	Apr.	10	2009	May	18	2010	May	11	2010
Jan.	22	2008	Apr.	24	2009	May	26	2010	May	26	2010
Jan.	23	2008	May	04	2009	May	27	2010	May	27	2010
Jan.	24	2008	May	05	2009	May	28	2010	May	28	2010
Jan.	28	2008	Oct.	13	2009	Oct.	18	2010	Oct.	18	2010
Jan.	30	2008	Oct.	14	2009	Oct.	25	2010	Oct.	25	2010
Feb.	01	2008	Oct.	15	2009	Oct.	30	2010	Oct.	30	2010
Feb.	04	2008	Nov.	11	2009	Nov.	08	2010	Nov.	08	2010
Feb.	20	2008	Nov.	18	2009	Nov.	10	2010	Nov.	10	2010
Feb.	22	2008	Nov.	21	2009	Nov.	22	2010	Nov.	22	2010
Feb.	25	2008	Nov.	30	2009	Nov.	23	2010	Nov.	23	2010
Mar.	13	2008	Dec.	07	2009	Nov.	24	2010	Nov.	24	2010
Mar.	17	2008	Dec.	14	2009	Nov.	29	2010	Nov.	29	2010
Mar.	31	2008	Dec.	22	2009	Dec.	15	2010	Dec.	15	2010
Apr.	23	2008	Dec.	28	2009	Dec.	17	2010	Dec.	17	2010
May	05	2008	Dec.	30	2009	Dec.	18	2010	Dec.	18	2010
May	27	2008	Jan.	12	2010	Dec.	19	2010	Dec.	19	2010
Oct.	06	2008	Jan.	13	2010	Dec.	20	2010	Dec.	20	2010
Oct.	31	2008	Jan.	19	2010	Dec.	22	2010	Dec.	22	2010
Nov.	03	2008	Jan.	20	2010	Dec.	23	2010	Dec.	23	2010
Nov.	04	2008	Jan.	22	2010	Dec.	27	2010	Dec.	27	2010
Nov.	10	2008	Jan.	23	2010	Dec.	29	2010	Dec.	29	2010
Nov.	27	2008	Jan.	25	2010	Jan.	03	2011	Jan.	03	2011
Dec.	15	2008	Jan.	26	2010	Jan.	18	2011	Jan.	18	2011
Dec.	16	2008	Jan.	31	2010	Jan.	31	2011	Jan.	31	2011
Dec.	19	2008	Feb.	08	2010	Jun.	07	2011	Jun.	07	2011
Dec.	22	2008	Feb.	09	2010	Jun.	29	2011	Jun.	29	2011
Dec.	26	2008	Feb.	22	2010	Jan.	19	2012	Jan.	19	2012
Jan.	02	2009	Feb.	24	2010	Jan.	20	2012	Jan.	20	2012
Jan.	05	2009	Feb.	25	2010	Jan.	21	2012	Jan.	21	2012
Jan.	06	2009	Mar.	01	2010	Jan.	22	2012	Jan.	22	2012
Jan.	22	2009	Mar.	03	2010	Jan.	23	2012	Jan.	23	2012
Jan.	23	2009	Mar.	04	2010	Feb.	01	2012	Feb.	01	2012
Jan.	26	2009	Mar.	10	2010	Feb.	12	2012	Feb.	12	2012
Feb.	06	2009	Mar.	15	2010	Feb.	13	2012	Feb.	13	2012

\* Dates gathered from publicly available rain and weather data collected at stations located near the Facility.



ATTACHMENT A  
Notice of Intent to File Suit, CEMEX (El Dorado, CA)  
Significant Rain Events, \* October 23, 2007 - October 23, 2012

\* Dates gathered from publicly available rain and weather data collected at stations located near the Facility.



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Law Offices of Andrew L. Paskard  
100 Petaluma Blvd. N., Suite 201  
Petaluma, CA 94952

VIA CERTIFIED MAIL  
Eric Holder, Attorney General  
U.S. Department of Justice  
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